United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2069

To be argued by
STEPHEN M. LATIMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs-Appellees,

—against—

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCH ARTZWALD, individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, etc., et al.,

Defendants-Appellants.

THE UNITED STATES OF AMERICA ex rel.
MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

DANIEL L. ALTERMAN
ROBERT BOEHM
WILLIAM M. KUNSTLER
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

JAMES REIF
National Lawyers Guild
23 Cornelia Street
New York, N.Y.

STEPHEN M. LATIMER
579 Cortlandt Avenue
Bronx, New York

ALVIN J. BRONSTEIN
NANCY CRISMAN
National Prison Project
1346 Connecticut Ave. N.W., Suite 1301
Washington, D.C. 20036

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases — Page

AUTHORITIES

MISCELLANEOUS

AUTHORITIES (continued)

UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 75--2069

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

MICHAEL KERN, et al., individually and as Justices of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; JAMES MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County,

Defendants-Appellants.

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

A. Preliminary Statement

This appeal is from a judgment and order of the United States District Court for the Eastern District of New York (Hon. Orrin G. Judd) dated March 26, 1975 mandating an evidentiary hearing if demanded and a written statement of reasons whenever a person accused of a felony in the Kings County Criminal Court or Supreme Court is incarcerated in lieu of bail. The final order embodies the findings of the lower court made in an opinion dated February 14, 1975 (hereinafter cited as "Op."). A notice of appeal was filed on March 28, 1975.

B. Questions Presented

I. May an accused person be jailed pending trial because of inability to meet financial conditions of release without an opportunity for an evidentiary hearing on the necessity for those conditions and without a statement of reasons for their imposition?

II. May a federal district court, confronted with state court bail practices that violate accused persons' Eighth and Fourteenth Amendment rights, grant relief that requires those courts to provide proper bail-setting procedures but does not enjoin or interfere with the merits of any bail decision or criminal case?

III. When pretrial detainees challenge state court bail-setting procedures and seek prospective procedural reform, and do not challenge the fact of their custody or seek release from custody, is habeas corpus their exclusive federal remedy?

C. Nature and History of the Case

The present appeal arises from a class action filed in the United States District Court for the Eastern District of New York by pretrial detainees held on felony charges in the Kings County Supreme Court.* The amended complaint alleges

---

(footnote on next page)

widespread and systematic denial of the constitutional rights to non-excessive bail, speedy trial, effective assistance of counsel, unabridged access to courts, due process of law, and equal protection of the laws.

(footnote from preceding page)

* This is the third appeal to this Court in the present case. In Wallace I, the District Court in May, 1973, after exhaustive hearings, found that "the criminal parts of the Kings County Supreme Court are in a state of deep crisis" and that "Legal Aid attorneys have excessive caseloads and that conditions under which they must work are shocking." Wallace v. Kern, No. 73 C 898 (Order of May 10, 1973, at 5, 33). The District Court preliminarily enjoined the defendant Legal Aid Society from accepting more than forty cases per attorney, and further enjoined the Clerk of the Supreme Court, Kings County from refusing to calendar pro se motions submitted by members of the plaintiff class. On appeal, this Court reversed on jurisdictional grounds, finding that the Legal Aid Society did not act "under color of state law" within the meaning of Section 1983 and that comity considerations barred the relief entered as to calendering of pro se motions. 481 F.2d 621 (1973), cert. denied, 414 U.S. 1135 (1974).

Subsequently, in Wallace II, after a second set of hearings, the District Court held that the trial delays in the Kings County Supreme Court violated plaintiffs' Sixth and Fourteenth Amendment rights. The court entered a preliminary injunction directing that persons under indictment in Kings County who had been incarcerated for more than six months (nine months in homicide cases) be tried or released on their own recognizance within forty-five days of their written request for trial. Wallace v. Kern, 371 F.Supp. 1384 (E.D.N.Y. 1973). This Court reversed, holding that relief from unconstitutional trial delays could not be granted prospectively to a class, though noting that "[l]engthy pretrial confinement continues to be the rule in Kings County." 499 F.2d 1345, 1349 (2d Cir. 1974), cert. denied, U.S. (1975).

Based on extensive testimony, "numerous depositions, and sheaves of exhibits, statistics and compilations" (Op. at 6), the District Court after trial found the bail-setting process at Criminal Court arraignment* to be inadequate to protect the rights of accused persons. Specifically, the court determined that the proceedings are perfunctory; there are inadequate time and facilities for effective consultation between the accused and counsel; and the basic data on which bail determinations are made are often incomplete and/or unverified. The court found these failings detrimental to an accused person's chances of obtaining pretrial release. Op. at 8-10. Bail review in the state courts was found substantially tainted by the initial determination and limited by the absence of statements of reasons for prior determinations. The most complete review available in the state system, in Special Term Part 10, generally occurs after at least two or three months of incarceration. Op. at 11-15.

Though he rejected the claim that money bail is per se unconstitutional, Judge Judd held (Op. at 64):

---

* This is the initial stage of the criminal process for virtually all members of the class, although a few persons are indicted after direct presentment to a grand jury and therefore never pass through the Criminal Court.

> The due process clause, however, requires that a decision which may result in prolonged confinement shall be based on full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached.
>
> * * *
>
> The necessity of improvements in the bail system is enhanced by the considerable length of time which frequently elapses in pre-trial confinement in Kings County.

Accordingly, in his Final Judgment Order and Decree (dated March 25, 1975, and hereinafter cited as "Order"), Judge Judd issued a declaratory judgment that the bail practices of the Kings County Criminal and Supreme Courts deprive the plaintiffs of liberty without due process of law. The court held that the plaintiffs are entitled to an evidentiary hearing on request after arraignment or as new evidence or circumstances require, as well as a written statement of reasons for each bail determination.

Judge Judd also found that the facilities for attorney-client consultation in the Criminal and Supreme Courts were so inadequate as to "impose a severe obstacle to the creation of any satisfactory lawyer-client relationship." Op. at 19-20. Accordingly, he ordered the defendants to submit within forty-five days a plan for assuring privacy in attorney-client conferences at all court appearances in Criminal or Supreme Court,

and he retained jurisdiction to review the plan and its implementation.* This portion of the order is not being appealed.

With regard to plaintiffs' other claims, Judge Judd denied their prayer for an injunction against the use of money bail as a condition for release from custody. He further refused to issue a judgment declaring that the bail and other practices complained of resulted in the coercion of guilty pleas. The complaint was dismissed in all other respects.

The defendants appeal from those portions of the order declaring that present bail practices are unconstitutional and that an accused person detained in lieu of bail has a right to an evidentiary hearing and a statement of reasons for the bail decision. On April 7, 1975, this Court stayed the judgment and ordered an expedited briefing schedule.

D. Statement of Facts

Criminal Court Arraignment

The question of bail for an accused person is first decided at arraignment in Criminal Court. The most important

---

* There is a typographical error in the Order at Paragraph 6, in that it would seem to indicate that jurisdiction was retained as to statements of reasons for bail determinations. However, the opinion makes it clear that jurisdiction is retained as to the plan for interviewing facilities. Op. at 663.

fact about this procedure is the court's enormous workload, which results in serious disorganization and in "inescapable" time pressure to process cases (B. 57, 60).* As a result, the usual arraignment takes from two to five minutes (Op. at 9; A. 52, 279; B. 60, 65, 295). The question of bail is reached only after the charges are read and the defendant enters a plea. Then the prosecutor makes a bail recommendation, usually emphasizing the severity of the charge and the defendant's prior record (A. 53, B. 3). The defense attorney also makes a recommendation.

Judge Judd found that "[d]uring the Criminal Court stage, inadequate information and inadequate access to counsel adversely affect the defendant's possibility of release pending trial." Op. at 9. Aside from the complaint, the arraignment judge has available two documents relevant to the bail question: the accused's prior criminal record (the "NYSIIS sheet") and the "ROR sheet," a form filled out by an employee of the Pre-Trial Services Agency (PTSA) based on an interview with the accused and on subsequent attempts to verify the accuracy of the information obtained. Both of these sources of infor-

---

* Numbers in parentheses preceded by the letter "B" refer to pages in appellees' separate appendix. Numbers preceded by "A" refer to pages in appellants' appendix. Portions of the transcript not included in either appendix are identified by date and page.

mation are very important in determining whether bail will be required, and if so how much, yet they are frequently incomplete and/or inaccurate.

The prior criminal record -- which is the most significant factor affecting the bail decision (B. 64, 70-71, 243-44) -- is very often incomplete. Though it lists all prior arrests, the dispositions of those charges are often missing or inaccurate (Op. at 9-10; B. 62-63, 241, 317-18). Information on warrants, also contained in the arrest record, is often incorrect, with warrants listed as outstanding long after their withdrawal or execution and sometimes listed on the wrong person's record (B. 64, 108-09).

The absence of correct information is prejudicial to the defendant. Judge Judd found that "[o]pen charges on the NYSIIS report are often given weight . . ." (Op. at 10), a finding supported by the testimony of a Criminal Court judge (A. 55-56) and several defense attorneys (B. 63, 99, 242-43). Defendants' undocumented statements about prior dispositions are often treated as suspect by arraignment judges (Op. at 10-11; B. 26-27, 242-43, 319-20), although Administrative Judge Damiani testified that the accused's statements are almost always correct (A. 285).

The ROR sheet is also frequently incomplete. Because

it is used by the Pre-Trial Services Agency in deciding whether to recommend an accused person as a good risk for release on recognizance, it contains information on his or her employment, education, family and living arrangements, and other community ties. Between the interview and the arraignment, PTSA attempts to verify the accused's statements through telephone calls, official records, and other sources (A. 170-72), but Judge Judd found that "in most instances it is not possible to verify facts favorable to a defendant before the initial bail hearing." (Op. at 10; B. 58-60, 240). This lack of verification -- like the absence of dispositions on the NYSIIS sheet -- works against the accused's chances of pretrial release; as Judge Judd further found, "unverified favorable facts on the ROR sheet are often denied weight." (Op. at 10; A. 98-100; B. 61, 240).

These problems cannot be remedied by defense counsel prior to arraignment because of the unrelenting pressures of volume in their working situation. This is further due in part to the lack of adequate facilities for attorney-client conferences in the Criminal Court (Op. at 19), the subject of additional relief which has not been appealed. But more important are the time pressure,* courtroom responsibility, lack of supporting staff, unavailability of criminal case

---

* Legal Aid attorneys may do several dozen arraignments a day (B. 52-53).

records from outside Kings County, and unavailability of any records at all outside normal daytime working hours (B. 63-64, 98, 242). Judge Judd found that "[d]etermining what happened after the arrests is a time-consuming job, especially for arrests outside of Kings County, and is rarely done." Op. at 10. Similarly, the attorneys are rarely able to verify information from unverified ROR sheets in time for the arraignment (B. 60-61).*

The result of this lack of information, naturally enough, is frequently disastrous to the accused. Judge Judd concluded (Op. at 10):

> The testimony in this case justifies a finding that more defendants would be released on their own recognizance or on low bail if more information could be verified at an early stage.

Bail Review in Criminal Court

After arraignment there is no meaningful bail review in Criminal Court. Theoretically, Criminal Court papers are reviewed by the Administrative Judge, without the presence of counsel or of the defendant, but Judge Booth testified that he had never heard of a bail change after such review (A. 71).

---

* By contrast, two attorneys who are not subject to the extreme time pressures described above testified that they are able to check case dispositions and other background information (B. 94, 108, 251).

Though bail is reviewable at the preliminary hearing, theoretically within 72 hours, in fact the preliminary hearing is usually adjourned, often for several weeks (Op. at 8; A. 62).* At the hearing, there is usually no presentation of evidence pertinent to bail, and Judge Judd stated that "testimony indicates that this seldom occurs unless there is a guilty plea or a substantial reduction in the charges." (Op. at 8; B. 83-84). Although in theory bail may be reviewed by habeas corpus in Supreme Court while the case is still in Criminal Court, the procedure takes about a week in Kings County and is seldom successful (B. 247-48); the amount of work involved in such an application was described as "almost prohibitive" by one Criminal Court attorney (B. 67).

Supreme Court arraignment

Bail procedures at arraignment in the Supreme Court are largely a repetition of the Criminal Court arraignment. They are marked by the same time and caseload pressures that exist in Criminal Court, with thirty to fifty accused divided between two defense lawyers on a typical arraignment day. The pressure is increased because many judges try to finish arraign-

---

* In some cases the accused does not receive a preliminary hearing at all; the prosecutor instead obtains adjournments until a grand jury indictment can be voted, thus pre-empting the preliminary hearing. This practice is especially common in narcotics cases involving undercover sales (B. 100-03).

ments before 1:00 p.m. (B. 143-45, 154-55). As a result, the normal arraignment lasts two to five minutes (Op. at 11; B. 153). On the bail question, as in Criminal Court, there is a brief recitation by the prosecutor, usually focusing on the charges and the accused's prior record (B. 153), with a brief response by defense counsel.

Generally, the information before the court is the same as that before the Criminal Court at arraignment. There is no systematic attempt to verify information on the ROR sheet between Criminal Court arraignment and Supreme Court arraignment. Follow-up by PTSA is limited to twenty-five to thirty cases a month in which the accused would be recommended for release on recognizance if the relevant information were verified (A. 182-85). There is no new interview, or further inquiry by PTSA, at the Supreme Court level. Dispositions of prior charges, if missing in Criminal Court arraignment, are still missing, a situation termed "unjust" by Justice Brownstein, who conducts Supreme Court arraignments (A. 94).

The defense attorney addresses the bail question with a minimum of preparation. Although the accused has probably been incarcerated for three to six weeks, no attorney has been responsible for the case between the preliminary hearing and the Supreme Court arraignment (B. 71), and no

follow-up on missing or unverified bail information has been made. The Supreme Court attorney receives the Criminal Court attorney's file late in the afternoon before the arraignment, containing only the information available in Criminal Court plus a summary (but not the minutes) of the preliminary hearing (B. 151-52). Thus, as in Criminal Court, "[m]ost attorneys lack time to investigate case dispositions or verify information on the ROR form." Op. at 11. They also lack time either to conduct extensive interviews with the accused or to contact the defendant's family or employer, despite the helpfulness of the latter in obtaining a favorable bail result (B. 154-55).

As a result, Supreme Court arraignment seldom produces a change in bail conditions (judges: A. 97, 211, 279; lawyers: B. 101, 156). Judge Judd stated that "it was conceded that generally 'those who are in stay in, and those who are out, stay out.'" Op. at 8. Although bail is supposedly set de novo in the Supreme Court, Judge Judd further found that "[s]ubstantial weight is given to the initial determination of the Criminal Court judge, although the basis for his determination is not before the court." Op. at 11. Supreme Court Justice Brownstein observed that "if there was an error in the Criminal Court, that error is continued right throughout this time in Supreme Court." (A. 97). The impossibility of effectively challenging

the previous bail determination is compounded by the fact that "frequently by the time I get [the accused] there is really very little of his family left and no opportunity for him to get a job" without assistance (Justice Brownstein, A. 144; cf. Justice Barshay, A. 344).

Bail Review in the Supreme Court

After arraignment, a defendant may seek bail review in two ways. One is by a motion in the trial part. There will be a five to six week delay after the initial post-arraignment conference before the accused will be produced in the trial part (A. 292-93). Thus, a person may have been incarcerated for four months or more before he first appears in the trial part at all. By rule, an oral bail application can be made at every appearance in the trial part, but some justices continue to insist that bail applications be made only on papers, which must be channelled through the motion part (Part I), causing a delay of up to a month prior to hearing and often longer before decision (B. 174-75, 338-39).

The other avenue of bail review is to make an application on papers in Special Term, Part 10. Ten to fourteen days generally elapse between filing and hearing the motion (B. 332-33). Usually, review in Special 10 is

sought only after relief is denied in the trial part (A. 216, 341; B. 333). As a result, Judge Judd found that "[t]he average person whose bail motion comes on in Part 10 has been in jail at least two or three months, often as long as a year or more, and sometimes as long as two years." (Op. at 12; B. 331, 341-53*).

Neither avenue of bail review is markedly successful, and those who are initially remanded in lieu of bail generally stay in jail throughout the pendency of their cases because the initial determination is not often altered without compelling reasons or new facts (A. 216). If the accused cannot prevail initially in the trial part, he is unlikely to obtain more than slight modification in subsequent applications, before the same judge or elsewhere (B. 300). Sometimes small reductions will be granted in successive bail applications (B. 341-53), leading one attorney to describe his attempts to "whittle away" the bail figure (B. 166).

A final factor undercutting the usefulness of Supreme Court bail review is that the passage of time is likely to render

---

* The last citation is to the affidavit of John Boston on bail review. This affidavit is a compilation of data gathered from the Supreme Court files with the consent and assistance of appellants' counsel. No objection was offered to its submission to the District Court.

useless much of the information that could be produced. Employment references taken at the time of arrest are of little use after months of incarceration, even if verified then (A. 144; B. 323). Family ties and other relationships are substantially weakened by this time (B. 360, 379-80, 389-91, 395-96).* Perhaps the only relevant factor that the accused can bring out in the course of bail review after such a period of detention is the increasing prejudice he is suffering from extended incarceration.

The Need for an Early Hearing

The value of a post-arraignment bail hearing at which evidence could be presented and bail set de novo was testified to by Judge Booth and Judge Brownstein (A. 61, 97) and by defense counsel (B. 72-73). The director of Legal Aid's Criminal Defense Division suggested that PTSA could be expanded to provide a verified report on each accused at such a hearing (B. 295-97, 311-13). In the small number of cases for which PTSA does a post-arraignment follow-up, 72 hours is usually sufficient time to verify previously

---

* The first two citations are to expert testimony by Bernard Segal and Dr. Sheldon Cholst, offered in the hearings on Wallace II, supra, and relied on by Judge Judd. 371 F.Supp. at 1388. These findings were not disturbed by this Court's reversal on the law. The record of those hearings, and of the earlier Wallace I hearings, was incorporated into the present record with appellants' consent during the trial. See Transcript, July 25, 1974, at 4.

unconfirmed information (A. 84). The potential importance of this opportunity is indicated by testimony that community ties and supervision are more important than small sums of money in assuring the reappearance of indigents (A. 202-03; B. 282-83), and by judges' testimony regarding the helpfulness of PTSA's information (A. 75, 288-89). Furthermore, it is clear from the testimony discussed above that such a hearing must be given at an early stage in the proceedings, so that the factors that enhance "bailability" (employment, enrollment in school, family ties, living arrangements) will not be destroyed by incarceration before the hearing is held.

The Need for a Statement of Reasons

The evidence shows, and Judge Judd found, that the absence of a statement of reasons for bail determinations is a crucial factor in preventing accused persons from obtaining a full and fair bail determination. Reasons are often not given for the bail set in Criminal Court (judges: A. 59, 94, 281-83, 346-47; attorneys: B. 71, 245; prisoners: B. 7, 121-22). Even where a statement is given, it is not usable in later proceedings. As Judge Judd found: "While many judges put such reasons in the record, only a few write them on the papers. Since the record is not transcribed, the reasons are not available for consideration by the Supreme Court Justice."

Op. at 15. An administrative directive that reasons be written on the papers is generally not followed. Op. at 14-15.

A statement of reasons for the bail determination is vitally important to the accused because of the influence the initial bail decision exerts in later proceedings. Judge Judd found that at Supreme Court arraignment, "[s]ubstantial weight is given to the initial determination of the Criminal Court judge, although the basis for his determination is not before the court." Op. at 11. The absence of a statement of reasons means that it is impossible for an accused to show that he has new facts or circumstances bearing on the concerns of the previous court, or that important facts were misinterpreted or weighed improperly; in fact, it is impossible to show what information was or was not before the court that set bail initially. (See A. 144-46; B. 66-67, 254). As a result, one Supreme Court justice stated that errors made in Criminal Court are "continued right throughout this time in Supreme Court." (A. 97). These considerations apply to other forms of bail review as well, and the usefulness of a statement of reasons for purposes of bail review was acknowledged both by defense counsel (B. 71, 245) and by judges who conduct bail review (A. 144-46, 281-82, 346-47).

The Effects of Pre-Trial Incarceration

One of the reasons why proper bail procedures are so vitally important is that the consequences of pre-trial detention are so disastrous for the accused. Speedy trials continue to be an illusion for the average defendant in Kings County Supreme Court, as this Court has recognized. Wallace v. Kern, supra, 499 F.2d at 1349. Though the backlog of untried cases per part had decreased somewhat as of the date of the trial below, further reductions appear unlikely, and the present statutes* providing for mandatory minimum prison sentences in narcotics cases and second felony offenses threaten to increase the demand for trials and therefore the backlog (A. 112-13, 115-16, 250-51). Thus, a person who does not obtain some form of pre-trial release faces the prospect of many months, and often a year or more, of incarceration in squalid and oppressive conditions.

But more is at stake than the mere fact of detention. The evidence indicates that the decision to release or incarcerate may ultimately determine whether or not the accused will be convicted, and if so, whether he will be sentenced to prison (A. 74, 84; B. 204-05; Transcript, July 31, 1974, 505-07;

---

* L. 1973 Ch. 276-78.

Transcript, October 18, 1974, 45-46).

Plaintiffs' witnesses have shown that:

(1) The strength of the defense case suffers from the inability of the accused to gather witnesses and evidence (B. 32-33, 77, 170-72, 372; Transcript, July 25, 1974, 48-49; Transcript, July 30, 1974, 403-04).

(2) Incarcerated persons lose contact with employers and family members and must interrupt their education (B. 379-80, 390-93).

(3) Detained persons suffer severely debilitating psychological consequences from incarceration that lead to severe anxiety and apathy and eventually to pleas of guilty, regardless of guilt or innocence.* See particularly the testimony of Dr. Sheldon Cholst, M.D. (B. 375-83), Dr. Stephen Teich, M.D. (B. 384-409), and Prof. Bernard Segal (B. 354-74). Pleas are not infrequently taken from people who continue to profess their innocence (Transcript, July 30,

---

* A major component of the psychological pressure of pre-trial incarceration is the detainee's absolute uncertainty about the future -- one respect in which the pre-trial prisoner is worse off than the convict. As prisoner Keith Ryan stated, ". . . waiting here without a trial, without a bail, without knowing, just the not knowing when you are going to trial, not knowing what will happen, that has more of a detrimental effect upon a person than anything else." (Transcript, July 25, 1974, 50). Mr. Ryan was subsequently acquitted after over a year in jail. Op. at 7.

1974, 241-42, 292; Transcript, July 20, 1973, 52, 140-42, 156-57; Transcript, February 22, 1973, 280-83, 299). Even Justice Damiani, testifying for defendants-appellants, demonstrated an awareness of the inherently coercive aspects of pre-trial incarceration when he contrasted the willingness of a person who is already jailed to do a few more months in jail against the unwillingness of a person on the street to go to jail at all (A. 314).

(4) The incarcerated accused receive considerable pressure from their attorneys -- particularly, according to prisoner testimony, 18-B attorneys -- to accept pleas (B. 329-31; Transcript, July 29, 1974, 19, 104-09, 219-20; Transcript, July 31, 1974, 481; Transcript, February 22, 1973, 252).

(5) Incarcerated persons suffer both in the plea offers and sentences they receive because of their inability to prove that they can hold a job and keep out of trouble (B. 179-80, 373). This is highlighted by the dispositions of participants in the Pre-Trial Services Agency's supervised release program. Of forty-five convicted persons on supervised release, only two were ultimately sentenced to jail (A. 195).

Based on this evidence, Judge Judd found that persons detained pending trial were more likely than those bailed or released to be convicted; less likely to receive probation if convicted; and likely to receive a longer sentence if sent to prison. Op. at 22-23.

POINT I

THE RELIEF GRANTED BELOW IS APPROPRIATE AND NECESSARY TO CORRECT THE BAIL PRACTICES OF THE KINGS COUNTY CRIMINAL AND SUPREME COURTS WHICH VIOLATE APPELLEES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The Importance of Bail

The question of bail, on which an accused's pre-trial liberty turns, implicates the most fundamental rights our Constitution protects. Accused persons who are incarcerated are deprived of "an interest of transcending value," In re Winship, 397 U.S. 358, 364 (1970), i.e., "personal freedom in the most immediate and literal sense of those words." United States v. Thompson, 452 F.2d 1333, 1340 (D.C.Cir. 1971), cert. denied, 405 U.S. 998 (1972). "(W)hat is at stake is no less than the freedom to be free." Id. Subsumed under that basic right are the freedom to walk about, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 686 (D.Mass. 1973), aff'd on other grounds, 494 F.2d 1196 (1st Cir.), cert. denied, ____ U.S. ____, 95 S.Ct. 239 (1974); to travel, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969), and to associate freely with persons

of one's own choice, Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963). Also included -- and radically denied by the exigencies of pre-trial incarceration -- are the fundamental right to privacy, Roe v. Wade, 410 U.S. 113, 152-53 (1973); the right to choose and maintain one's family relationships, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); and the "right to be let alone," which Mr. Justice Brandeis once termed "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

That these deprivations are real and substantial, rather than theoretical, is amply shown by the record.* See also, Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y.), aff'd in part, remanded in part, 507 F.2d 333 (2d Cir. 1974). Pre-trial incarceration disrupts employment and education, often irreparably, and weakens or destroys family bonds. It subjects the accused to oppressive and degrading physical living conditions; substantial pressures to suicide are created, and tranquilizing drugs are widely used. Incarceration further creates resentment, bitterness, apathy and anxiety in the accused. It may destroy his faith in the criminal justice

* The record in this case and the following discussion substantially support the conclusions of the Temporary Commission on the Courts regarding the effect of pre-trial detention. See And Justice for All: Report of the Temporary Commission on the New York State Court System, Part II, 66 (1972).

system as a fair and orderly means of resolving the accusations against him. It may even permanently impair his ability to relate and communicate with others.

Besides these harsh and drastic impositions on their personal liberties, pre-trial detainees suffer severe burdens on their right to a fair trial. Detention drastically limits the accused person's ability to marshall evidence, locate witnesses, and consult with counsel, a fact amply shown by the present record and recognized generally by the Supreme Court. Smith v. Hooey, 393 U.S. 374, 379-80 (1969); Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring). These burdens on the defense are aggravated by the difficulty attorneys experience in interviewing their jailed clients. See Souza v. Travisono, 368 F.Supp. 959 (D.R.I. 1973), aff'd in part, 498 F.2d 1120 (1st Cir. 1974). Moreover, the fact of detention constitutes a substantial and significant coercion to plead guilty, and thus threatens the right of an accused to have any trial at all. See Fabricant, Bail as a Preferred Freedom and the Failures of New York's Revision, 18 Buff.L.Rev. Rev. 303, 304-306 (1969); Note, A Study of the Administration of Bail in New York City, 106 U.Pa.L.Rev. 693, 725-726 (1958).

Finally -- and crucially, in a system where most dispositions are by guilty plea -- the fact of detention

severely restricts the accused's ability to minimize or avoid penal sanctions by impairing the ability to put forth a strong case for alternative dispositions. See generally, Nimmer, Diversion: The Search for Alternative Forms of Prosecution (American Bar Foundation 1974). These include outright diversion from the criminal process, probation or a suspended sentence, or a guilty plea contingent upon such non-custodial conditions as continued employment or participation in therapy. The accused who is released on bail may be able to get or retain employment, display an ability to remain drug-free, or find other ways to demonstrate repentance and rehabilitation. The detainee, conversely, can only promise to do such things.

The end result of these cumulative deprivations is made apparent by the record and was recognized by the District Court (Op. at 22-23):

> The court finds that trial results are likely to be less favorable for a prisoner in jail than for one who is at large, though the extent of the difference cannot be defined. The man who is in jail is also less likely to be given probation if convicted, than the man who is on the street. This result is inevitable, for a man at large has had an opportunity to build an employment record and show his conformity with the law during the one to three years which will have preceded his trial.

* * *

> If a prison sentence is imposed, the evidence in this case indicates that it is generally shorter for a man at large than for one who is already in jail, although the extent of the variation cannot be determined. . . .

This evidence and conclusion only confirm the results of empirical studies conducted in other jurisdictions regarding pre-trial detention and case outcomes. The Legal Aid Society's Manhattan study* showed that among similarly situated accused persons those who are detained pending trial are convicted more often, and if convicted are sentenced to prison more frequently and for longer terms, than those released prior to disposition. The study further shows that detention is itself a major cause of a less favorable outcome for the accused. This finding is consistent with those reported by other researchers.** In fact, these elaborate

---

*This study was entered into evidence by the appellees, although Judge Judd did not consider it probative as to Kings County. It has also been published. See, The Unconstitutional Administration of Bail, 8 Crim.L.Bull. 459 (1972). At the trial, Dr. Eric Single, who oversaw the design and execution of the study, testified that its findings have been confirmed in a later study involving a larger sample and improved methodology. See Brief of Amicus Curiae, Legal Aid Society.

**See Greenwood, et al., Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective 48-52 (Law Enforcement Assistance Administration, United States Dept. of Justice, 1973); Taylor, et al., An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado, 50 Denver L.J. 9, 36-39 (1973); Taylor, et al., An Analysis of Defense Counsel in the Processing of Felony Defendants in San Diego, California, 49 Denver L.J. 233, 261-63 (1972); Note, Preventive Detention: An Empirical Analysis, 6 Harv.Civ.Rts.Civ.Liberties L.Rev. 289, 347-48 (1971), and materials cited therein; Rankin, The Effect of Pre-Trial Detention, 39 N.Y.U.L.Rev. 641 (1964).

studies supply empirical confirmation of what has been a truism among experienced observers for years, see, e.g., And Justice for All: Report of the Temporary Commission on the New York State Court System, supra at 66; Goldfarb, Ransom 40-43 (1965), and

> . . . one conclusion of studies on the subject is relevant to an analysis of the plight of pre-trial detainees: the propensity of an accused to negotiate a plea is as much a function of his stamina in the face of brutal conditions, of pressures from the court, prosecution, and defense attorney, and of his faith that the criminal justice system can reach an accurate and fair result, as it is a function of his actual guilt. Thus, pre-trial detention can improperly influence the defendant to plead guilty. Note, An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation, 9 Colum.J.Law & Soc.Prob. 394, 400 (1973).

The Constitutional Principles as to Bail

The nature and consequences of the bail-setting process necessarily invoke the protections of the Constitution. The Eighth Amendment provides that "(e)xcessive bail shall not be required," and under familiar principles of "incorporation" the states are bound by this prohibition. Once it is decided that a particular Bill of Rights guarantee is "'fundamental to the American scheme of justice,' Duncan v. Louisiana . . . ," the same constitutional standards apply against both the State and federal Governments. Benton v. Maryland, 395 U.S. 784, 794 (1969). The Bail Clause is such a fundamental guarantee.

Pre-trial release under proper conditions "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, supra, 342 U.S. at 4. Accordingly, this Circuit "entertain(s) little doubt" that the Supreme Court would hold the Bail Clause fundamental and binding on the states. United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972). Accord, Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963).

Apart from the incorporation of substantive standards articulated by the Bill of Rights, the Fourteenth Amendment's Due Process Clause independently protects individuals from arbitrary governmental action by imposing procedural safeguards wherever a substantial interest in liberty or property is implicated. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 569-74 (1972). The requirements of procedural due process are not inflexible. Rather, they are determined in each case by the nature of the state interest and the individual right at stake. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

In this case, the requirements of procedural due process imposed by the Fourteenth Amendment and the substantive

guarantee of non-excessive bail imposed by the Eighth Amendment intertwine to support the result reached below. The Bail Clause requires, for its meaningful implementation, that there be procedural protections adequate to assure that bail will not be set in an amount that under all the circumstances is excessive.*

The contours of due process are determined by the substantive law of bail, and the most fundamental aspect of bail is its limited purpose. Interpreting the Bail Clause, the Supreme Court has stated:

> . . . (Bail) serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. (Citation omitted.)
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. Stack v. Boyle, supra, 342 U.S. at 5.

This view of the purpose of bail was reaffirmed in Bandy v. United States, 81 S.Ct. 197 (1960) and Reynolds v. United States, 80 S.Ct. 30, 32 (1959).

---

*As Justice Frankfurter observed, "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943).

Second, bail is to be set according to the special circumstances of each case. "Each defendant stands before the bar of justice as an individual." Stack v. Boyle, supra, 342 U.S. at 9 (Jackson, J., concurring). Thus, in a conspiracy case, where bail was set in a uniform amount for eight defendants based on a general recitation about the charges, their community ties, and their attitudes toward the legal system, the Fifth Circuit held that the bail-setting court must "consider the factors with respect to each defendant that would justify the conditions of release imposed in this case." United States v. Briggs, 476 F.2d 947, 948 (5th Cir. 1973) (emphasis in original). Similarly, in Ackies v. Purdy, 322 F.Supp. 38 (S.D.Fla. 1970), the court found unconstitutional the setting of bail by "master bond schedules" based only on the offense charged.

Third, the bail decision must be based on facts,* as the Supreme Court acknowledged in Stack v. Boyle, supra, 342 U.S.

---

*Appellants object to Judge Judd's placing the burden of proving the need for monetary bail on the prosecution (Order, Paragraph 3 (a)) and to his failure to specify the degree of proof required. Common sense indicates that proof by a preponderance of the evidence is the proper test. As to the allocation of the burden, what is to be proved is a substantial probability that specified release conditions are necessary to assure an accused person's return to court. Whether this question is cast in the affirmative or in the negative is primarily a matter of semantics. Certainly it is not an impossible or unreasonable burden, and in many cases it could be met by the information that is supposed to be before the court in any case (i.e. prior criminal record, nature of the charges, and a correct and verified ROR sheet).

These technical arguments, however, are largely beside the point. The fundamental fact is that pre-trial incarceration is a drastic deprivation of liberty based only on an unproved accusation. To permit the state to impose this burden with no showing of its necessity is inconsistent with the presumption of innocence.

at 5-6.

> It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case . . . .
>
> * * *
>
> If bail in an amount greater than that usually fixed for serious charges of crime is required in the case of any of the petitoners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved.

As Judge J. Skelly Wright observed more recently, "the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based." Pannell v. United States, 320 F.2d 698, 702 (D.C. Cir. 1963) (concurring opinion).

Due Process and Non-Excessive Bail: The Hearing Requirement

The record shows that bail practices in Kings County operate in plain violation of the constitutional mandate that there be careful case-by-case inquiry based on facts and circumstances relevant to each individual accused in order to set the least onerous conditions that will assure that person's continued appearance in court. They are marked by perfunctory proceedings, missing or misleading information, inadequate investigation and consultation by counsel, and the absence

of meaningful review. By failing to provide an opportunity for all relevant information to be heard, and by denying the accused a meaningful opportunity to be heard, the Criminal and Supreme Courts of Kings County subject appellees' class to bail determinations that are just as arbitrary as the "blanket bail" condemned by Justice Jackson in Stack v. Boyle, supra, and in the Briggs and Ackies cases, supra. Thus, state practices and procedures for bail determinations are not designed to and in fact do not result in the setting of bail conditions that are non-excessive in the constitutional sense of that term.

The scope of procedural requirements for the bail-setting process has never been delineated by the Supreme Court; however, the general principles of due process, as articulated by the Court, fully support the decision below. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914); see also, Goss v. Lopez, ____ U.S. ____, 95 S.Ct. 729, 738 (1975). Goldberg v. Kelly, 397 U.S. 254 (1970). As was observed in Ackies v. Purdy, supra, 322 F.Supp. at 41: "Since procedural due process requires a hearing in various administrative proceedings a fortiori, it requires a hearing before depriving a person of his liberty for periods of days, weeks, or months."*

*The case of United States ex rel. Shakur v. Commissioner, 303 F.Supp. 303 (S.D.N.Y.), aff'd, 418 F.2d 243 (2d Cir. 1969), cert. denied, 397 U.S. 999 (1970), is inapposite. There, petitioners alleged that they were held on excessive bail in the state courts. The District Court reviewed their

But more than a nominal hearing is required. The hearing must be "at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This standard derives its content from the constitutional purpose of the hearing as well as from the competing interests involved. The hearing must be so structured procedurally as to make it probable that its aim (i.e., the setting of non-excessive bail) will be fulfilled.

The purpose of bail-setting is to render a decision which, though judgmental and predictive in nature, ultimately rests on facts. Stack v. Boyle, supra, 342 U.S. at 5-6. Thus,

---

(footnote continued from preceding page)

bails on habeas corpus and held that they could not be said to be arbitrary or discriminatory, the normal standard for federal habeas review of bail. See, e.g., Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir. 1964). This Court also denied relief, emphasizing the proximity of trial and defense counsel's dilatory tactics. 418 F.2d at 244.

The District Court added that whether or not to hold an evidentiary hearing was entirely within the state court's discretion. 303 F.Supp. at 308. That holding should not be persuasive here for several reasons. Because the issue there was the excessiveness of the petitioners' bail, not the constitutionality of state court procedures, the scope of federal review was correspondingly limited, as noted supra. Moreover, it is clear that no record was made that would support a constitutional evaluation of state court bail practices generally. Last -- and weighed heavily by the District Court--is the fact that the state court had requested affidavits on the bail question and the petitioners had "persistently fail(ed)" to supply them, conduct the District Court condemned as obfuscatory. Id.

as Judge Judd declared, due process requires a hearing at which the state must show the need for monetary bail if it is recommended, and the accused may controvert that evidence and/or present independent evidence showing that such bail is not required. Order, Para. 3. The present practices, under which an initial determination is made on grossly inadequate information with insufficient opportunity for counsel to prepare, and under which the accused never gets a full opportunity to present evidence in his favor,* fall far short of the constitutional standard. For example, one need not go so far as to say that an accused is entitled to a bail he can afford in order to agree that a court lacking information on the accused's financial resources is hardly in a position to make an informed decision on the bail amount required to assure his reappearance.

The timing of the bail-determination hearing required by due process also depends on the practical constraints and the nature of the rights at stake in the factual context. In other situations, an informal hearing immediately after some

---

* The nearest approach to a full hearing is bail review in Special Term, Part 10, which often occurs only after months of incarceration. Even there, the proceedings are limited to the presentation of argument rather than evidence, and are hampered by the lack of stated reasons for previous decisions.

action is taken, Morrissey v. Brewer, supra, or even a formal hearing before any action is taken, Goldberg v. Kelly, supra, is required, with opportunity for a fuller hearing later. The District Court here, however, did not order that an evidentiary hearing be granted at Criminal Court arraignment before an accused person can be incarcerated. To do so would only have been to protract and delay the arraignment process, and would have been ineffective in any event because of insufficient time to obtain full and correct information on the accused's background and prior criminal record. Moreover, a large number of persons are released on their own recognizance at arraignment, and thus to require a full hearing in every case would be a substantial waste of resources. On the other hand, pre-trial incarceration is one of the most severe deprivations of liberty a person can suffer, and each day of needless detention is an irremediable loss. The need for an early opportunity for a full hearing is underscored by the fact that incarceration may erode the very relationships -- family, employment, community -- that courts rely on in releasing accused persons before trial.

The solution provided by Judge Judd's order is fair and workable. Beginning 72 hours after arraignment, the accused may request a hearing, which must thereafter be given within five days. At that point, far fewer accused persons

are in jail than were there at or shortly after arraignment, and the time pressures of the arraignment parts may be avoided. Further, by requiring the accused to initiate the process, this procedure minimizes the waste of time that automatic hearings might cause. It also permits the accused and his counsel on their own to balance the need for prompt action to protect basic liberties against the need for time to prepare for a hearing. This procedure, therefore, protects the interests of the accused and the interests of the state alike.

Appellants' brief contains seriously misleading statements on this point. In two places they purport to show how extensive a burden these evidentiary hearings would place on the state court system (Appellants' Brief at 10n., 40n.). However, these calculations are based on the present caseload of the arraignment parts, ignoring the facts that (a) Judge Judd did not order that hearings be held at arraignment, (b) a substantial number of persons obtain their release at or shortly after arraignment, and (c) it is unlikely that every accused person will a hearing under the order. Even under the present inadequate procedures, not every judgment is incorrect. In some cases, also, an indigent defendant may believe that a mistake has been made, but realize that, e.g., his or her lack of

family ties means that even an accurate assessment of bail will be too high for him to meet. Hence, the maximum number of hearings required would be much smaller than the state suggests, and the burden to be imposed on the state courts would by no means be excessive, especially considering the importance of the rights at stake. Judge Judd's order thus respects the teaching of Gerstein v. Pugh, ___ U.S. ___, 95 S.Ct. 854, 867 n. 23 (1975).

In any case, since appellants contend that bail review in the state courts is already "unlimited" (Appellants' Brief at 21), even if constitutionally inadequate, their concern for the courts' workload appears misplaced. It is quite likely that an early and adequate hearing would obviate the need for the repetitive applications necessitated by the present practice.

More importantly, appellants' arguments regarding the workload of the arraignment parts illustrates the necessity for the relief below. Appellants show by their own calculations that it is not possible for adequate consideration to be given the bail question at arraignment. After this concession, it is highly inappropriate for appellants to argue that a subsequent hearing to protect the constitutional rights of the accused should be denied because it is too burdensome. The Constitution is "the supreme Law of the Land; and the Judges

in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.Const., Art. VI, Cl. 2. If the present state court resources are inadequate to fulfill this mandate, it is the state's obligation to provide adequate resources. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, C.J.); Brenneman v. Madigan, 343 F.Supp. 128, 139 (N.D.Cal. 1972); Hamilton v. Love, 328 F.Supp. 1182, 1194 (E.D.Ark. 1971).

Due Process and Non-Excessive Bail: The Statement of Reasons

An accused person detained on a bail he cannot make is also entitled to a statement of reasons for the bail conditions imposed. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pre-Trial Release, Section 5.1(d) (Approved Draft 1968). A statement of reasons is as essential to due process as the right to be heard. Without it:

One may not be denied release on parole, United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir.), vacated as moot, 95 S.Ct. 488 (1974); Cooley v. Sigler, 381 F.Supp. 441 (D.Minn. 1974); Craft v. Attorney General of United States, 379 F.Supp. 538 (M.D.Pa. 1974), or be denied good time credit, Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974).

One may not be punished for infractions of prison rules, Wolff v. McDonnell, supra; Crooks v. Warne, 74 Civ. 2351 (S.D.N.Y., October 1, 1974) (Brieant, J.); or be transferred for disciplinary reasons, Aikens v. Lash, 371 F. Supp. 482 (N.D.Ind. 1974); White v. Gillman, 360 F.Supp. 64, 66 (S.D. Iowa, 1973).

One may not have one's welfare benefits terminated, Goldberg v. Kelly, supra, 397 U.S. at 271.

One may not be evicted from a public housing project, Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.) cert. denied, 400 U.S. 853 (1970).

One may not be denied conscientious objector status by a draft board, United States v. Lenhard, 437 F.2d 936 (2d Cir. 1970); United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970).

One may not be denied release from a hospital for mental patients, United States v. McNeil, 434 F.2d 502 (D.C. Cir. 1970)(per curiam) or be transferred to a ward for the criminally insane, Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971)(per curiam).

The function of a reasons requirement in the present context is threefold. First, it helps guarantee a proper decision in the first instance. As this Court stated in United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra, a statement of reasons "protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations." 500 F.2d at 929. This safeguard against improper incarceration is certainly as important for the presumptively innocent accused

as for the convicted prisoner. A statement of reasons also helps assure that care will be taken and a decision on the merits actually rendered. "A reasons requirement 'promotes thought by the decider,' and compels him 'to cover the relevant points' and 'eschew irrelevancies.'" Id. at 931 (citation omitted). In an overburdened trial court where time and volume pressure is the fundamental reality, there is a serious danger that the bail decision will be made hastily, with insufficient attention to the factual situation of the individual before the Court. Requiring a statement of reasons is a significant safeguard against decisions based on erroneous first impressions and inadequate reflection.*

The second important function of a statement

---

* As this Court has observed, with reference to findings of fact:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose -- that of evoking care on the part of the trial judge in ascertaining the facts . . . . Often a strong impression that, on the basis of evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. United States v. Forness, 125 F.2d 928, 942 (2nd Cir.) (Frank, J.), cert. denied, 316 U.S. 694 (1942).

of reasons is the facilitation of judicial review.* Justice Cardozo once observed, "We must know what a decision means before the duty become ours to say whether it is right or wrong." United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 294 U.S. 499, 511 (1935); see also, S.E.C. v. Chenery Corp., 318 U.S. 80, 94 (1943). With regard to parole denial, this Court has observed that "a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent . . . ," United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra, 500 F.2d at 929, and a reasons requirement was imposed there despite the nearly absolute discretion possessed by the Board to grant or deny parole. Here, by contrast, the proper purpose of bail is narrowly defined both constitutionally, Stack v. Boyle, supra, and statutorily, CPL 510.30(2)(a), and the statute sets out in detail the proper factors to be considered in setting bail.**

---

* Judicial review, of course, is related to the fairness of the initial decision. As the Supreme Court observed with respect to statements of reasons and evidence relied on for disciplinary actions against state prisoners, " . . . the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." Wolff v. McDonnell, supra, 418 U.S. at 565.

** CPL 510.30 provides in pertinent part:

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof

(footnote continued on next page)

(footnote continued from preceding page)

are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendence when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vi) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(vii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

Thus, the ability of a reviewing court -- in the state system or on federal habeas corpus -- to evaluate the decision under either an "abuse of discretion" or an "arbitrariness" standard is greater, and a statement of reasons that much more necessary. As one federal court stated in remanding a bail case for individualized statements of reasons, ". . . judicial review is effectively thwarted if the appellate court cannot determine the factors relied upon by the district court in reaching its decision." United States v. Briggs, supra, 476 F.2d at 948.

Finally, a statement of reasons will apprise the accused and his counsel of what must be shown in order to obtain a bail the accused can meet. This is particularly important in a context where missing and/or incorrect information is a chronic and serious problem. If the bail-setting court indicates, for example, that the absence of particular indicia of community ties has prevented an accused from obtaining a lower bail, he can shape a future bail argument around that point, and more importantly, the reviewing court can know that it is not merely overruling an equally competent court on a matter already fully considered. In addition, a statement of reasons will assist the accused in changing his situation to make himself more "bailable" -- e.g., by gaining admission to a supervised release program, arranging to live with relatives rather than alone, etc.

-- just as a statement of reasons for parole denial will let prisoners "know how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt (e.g., prospective employment or housing), better their chances for release." United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra, 500 F.2d at 932.

To achieve these purposes, the reasons given must be based on facts concerning the individual accused, although detailed findings are not necessary. In United States v. Briggs, supra, the Court of Appeals found it insufficient that the District Court in fixing $10,000.00 bail for each of eight criminal defendants "relied primarily on the seriousness of the charges alleged in the indictment but also considered the potential penalty which could be imposed if the defendants were convicted, the defendants' ties to the Gainesville, Florida community (the site of the trial), and the defendants' attitude toward the legal system." 476 F.2d at 948. The court held that "each defendant is entitled to know the reasons why the particular conditions of release were imposed in his case." Id. at 949 (emphasis in original).

Due Process Analogies

Appellees' argument from general due process principles and from the present record is strongly supported by the Supreme

Court's holding in Morrissey v. Brewer, supra. In Morrissey, the decision to revoke parole was held to require, at a minimum:

> . . . (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a "neutral and detached" hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. 408 U.S. at 489.

The standards of Morrissey, relied on by the lower court (Op. at 43-44), are appropriately applied to the determination of bail. First, a weighing of the competing interests in the bail determination process reveals that the individual's interest in liberty there is stronger, and the state's interest comparably weaker, than in the parole revocation context. The person accused of crime is presumed innocent until proven guilty, and therefore has a legitimate interest in liberty as broad as that of any other unconvicted person. Conversely, the state's interest in parole revocation is far broader than its interest in bail-setting, going to the totality of its correctional aims; its only interest in the bail determination is assuring the accused's reappearance in court. Compare Morrissey v. Brewer, supra, 408 U.S. at 483, with Stack v. Boyle, supra, 342 U.S. at 5-6. Thus, the balance of interests in the bail decision presents a stronger case for

at least the due process protections required in Morrissey than did the considerations in Morrissey itself. Secondly, the nature of the bail decision is analogous to the parole revocation decision. The purpose of bail setting is to determine the conditions required to assure an accused person's reappearance on the basis of facts and circumstances concerning that person. Thus, like the parole revocation decision, it is predictive and discretionary, as well as factual, cf. Morrissey, supra, 408 U.S. at 480, and similar procedures are needed to guarantee a fair and intelligent decision.

Appellants rely on the recent case of Gerstein v. Pugh, ____ U.S. ____, 95 S.Ct. 854 (1975), which, though concerned with the requirements of due process in the pre-trial stages, is not pertinent to the question of bail-setting procedures.* The Supreme Court in Gerstein held that although "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest," 95 S.Ct. at 863, a non-adversary hearing with informal methods of proof would be constitutionally acceptable because "(t)he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings . . . . The standard is the same as that for arrest." Id. at 866. The question of bail pending trial was not addressed in Gerstein; its holding goes solely to the

---

* Gerstein's holding that a federal court has power to grant relief against unconstitutional state court practices is discussed in Point II, infra.

requirements for imposing any restraint on a suspect's liberty, without reaching the due process question of what restraints are to be imposed.* See id. at 863 (referring both to pre-trial detention and to conditional release).

The Court further stated (id. at 867):

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.

While the bail determination likewise does not necessitate the "fine resolution of conflicting evidence" that is needed to determine guilt or innocence, it is far more complex than the simple "yes" or "no" determination of probable cause, which is more nearly akin to a finding that a prima facie case exists and requires no fact-finding or assessment of credibility. Thus, the bail determination is more like the parole revocation decision (Morrissey) than it is like the determination of probable cause (Gerstein). The bail-setting court, like the parole board, must choose among a myriad of alternatives: various amounts and kinds of financial conditions (CPL 520.10), release on

---

* It is worth noting that the ability of counsel to argue effectively for bail at the Alabama preliminary hearing was influential in the decision that the hearing was a "critical stage" requiring the appointment of counsel for the indigent, unlike the hearing contemplated in Gerstein. Coleman v. Alabama, 399 U.S. 1, 9 (1970). The Coleman holding was reaffirmed in Gerstein, though bail was not mentioned. 95 S.Ct. at 867-68.

recognizance (CPL 530.20), supervised release or other non-financial conditions, or denial of bail. In making this choice, the court, again like a parole board, is required to consider numerous criteria, only one among which is the merits of the case against the accused. CPL 510.30(2)(a)(i-vii), set forth supra at p. n. The Fourth Amendment standard for which the Court in Gerstein prescribed appropriate procedures is thus wholly different from the Eighth Amendment standard asserted by appellees, in its nature as well as its purpose. Summary bail determination procedures, akin to the type sanctioned in Gerstein, would ignore the explicit requirement of the Eighth Amendment that the court not fix "excessive bail" and, indeed, would cause "the presumption of innocence, secured only after centuries of struggle, (to) lose its meaning." Stack v. Boyle, supra, 342 U.S. at 4.

More relevant to the instant question is the line of recent cases in which this Court and others have held that the Constitution forbids "depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail." Rhem v. Malcolm, 507 F.2d 333, 336, 339 (2d Cir. 1974). Accord, Inmates of Suffolk County Jail v. Eisenstadt, supra, 360 F.Supp. at 685-86; Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157, 1160 (E.D.Wis. 1973); Brenneman v. Madigan,

343 F.Supp. 128, 138 (N.D.Cal. 1972); Hamilton v. Love, 328 F.Supp. 1182, 1192 (E.D.Ark. 1971); Jones v. Wittenberg, 323 F.Supp. 93, 100 (N.D.Ohio 1971), aff'd on other grounds sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). This principle is explicitly founded on the presumption of innocence that distinguishes pre-trial detainees from convicted prisoners, Rhem v. Malcolm, supra, 507 F.2d at 336, 342; Brenneman v. Madigan, supra, 343 F.Supp. at 137; Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971), and it flows naturally from the settled principle that governmental restrictions on fundamental rights, even in pursuit of a valid objective, "must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973). Accord, Procunier v. Martinez, 416 U.S. 396, 413-414 (1974)(prisoners' right to communicate with attorneys); Kusper v. Pontikes, supra (right to vote in primary elections); NAACP v. Button, 371 U.S. 415, 438 (1963) (right of association); Shelton v. Tucker, 364 U.S. 479 (1960) (right of association). A governmental purpose, however legitimate and substantial, "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Id. at 488.

Application of these fundamentals of due process to the bail-setting process should not be controversial. As Judge Judd observed (Op. at 54):

> The Supreme Court has held that there must be a jury trial on any offense which involves the possibility of imprisonment for more than six months . . . . It would be anomalous to permit a defendant to be held in jail for more than a year, without a trial, without any evidentiary hearing, and without a statement of the reasons why his bail is fixed at a figure he cannot meet.

Because incarceration is perhaps the most drastic legal restriction on individual liberty, its imposition on presumptively innocent persons must be hedged about with procedures reasonably designed to ascertain the least onerous conditions capable of attaining the end sought. Both this Fourteenth Amendment due process requirement and the Eighth Amendment requirement of non-excessive bail support this view, separately but even more forcefully when read together. The issue of bail, it has been shown, is crucial because it affects pre-trial liberty and because the outcome of the case itself may hinge on the bail decision. Thus, it would be difficult to imagine a decision of more far-reaching importance or one in greater need of procedural safeguards. The order below has put a constitutional floor under the hasty, insufficiently informed and often arbitrary bail-determination processes in state court in Brooklyn, and it merits this Court's affirmance.

POINT II

THE RELIEF GRANTED BY THE DISTRICT COURT IS PROPER UNDER PRINCIPLES OF FEDERALISM AND COMITY.

The recent Supreme Court decision in Gerstein v. Pugh, ____ U.S. ____, 95 S.Ct. 854 (1975), definitively establishes that considerations of comity and federalism do not bar the relief granted by the District Court in this case. Appellants cite a number of cases decided prior to Gerstein in support of their contrary position, including O'Shea v. Littleton, 414 U.S. 488 (1974), Younger v. Harris, 401 U.S. 37 (1971) (and its companion cases), and certain lower court decisions, including the previous decisions of the Second Circuit in this action. Appellees respond that these decisions are not applicable to the present action because the legal claims and relief sought or obtained in those cases were fundamentally different in kind from those involved here.

In Gerstein v. Pugh, the question presented was "whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty." 95 S.Ct. at 858. The plaintiffs, like appellees in the instant case, were pre-trial detainees with criminal proceedings pending in state courts, and they brought a class action under Section 1983,

seeking injunctive and declaratory relief directing the state authorities to accord them a probable cause determination. 95 S.Ct. at 859 and nn. 5 and 6. The District Court granted the relief sought, and ordered the defendants "to submit a plan providing preliminary hearings in all cases instituted by information." Id. at 860.

Subsequently, a final order was promulgated by the district court which "prescribed a detailed post-arrest procedure." Id. Upon arrest, an accused was to be taken before a magistrate for a "first appearance hearing." The magistrate was required to explain the charge, to advise the accused of his rights, to appoint counsel, and to proceed with a probable cause determination unless either side was unprepared. If more time were requested, the magistrate was to set a date for a preliminary hearing within four days if the accused was in custody, and within ten days if he had been released. The accused was entitled to the full panoply of procedural safeguards at the hearing, and sanctions were provided for failure to hold the hearing within the prescribed time.

The Supreme Court differed with the lower court on the merits, reversing in part and remanding for further proceedings. Specifically, the Court held that the adversary safeguards of a "critical stage" of the prosecution were not required because of the nature of the Fourth Amendment probable

cause standard on which the case turned. 95 S.Ct. at 866-69; see Point I, supra. But the Court agreed that the Constitution does require a judicial determination of probable cause, and it remanded for an appropriate order.

At no point did the Court question that, given a constitutional violation, the lower court had the power to enter the order it did. The Court stated (95 S.Ct. at 860, n. 9):

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, Younger v. Harris, 401 U.S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pre-trial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See Conover v. Montemuro, 477 F.2d 1073, 1082 (CA 3 1973); cf. Perez v. Ledesma, 401 U.S. 82 (1971); Stefanelli v. Minard, 342 U.S. 117 (1951).

The Gerstein holding effectively disposes of appellants' argument that Younger v. Harris, 401 U.S. 37 (1971), and its progeny bar the relief granted by Judge Judd. Though the substantive Fourth Amendment issue in Gerstein was quite different from the Eighth and Fourteenth Amendment claims raised here, the nature of the relief granted and its relationship to pending

state court proceedings were highly similar to those in the instant case. The Gerstein plaintiffs -- like the present appellees -- were a class of pre-trial detainees with pending criminal cases in the state courts; they too sought declaratory and injunctive relief against unconstitutional state court practices under Section 1983. The Gerstein defendants -- like the present appellants -- included judicial officers. Like the lower court in Gerstein, Judge Judd here declared the need for a hearing on certain pre-trial issues, imposed a timetable, and prescribed certain incidents of that hearing; in addition, he declared that an accused person is entitled to a written statement of reasons for the release conditions imposed. As in Gerstein, the declaration "is not directed at the state prosecutions as such," but only at the legality of bail imposed by improper procedures -- "an issue that could not be raised in defense of the criminal prosecution." 95 S.Ct. at 860 n. 9. Like the order to conduct preliminary hearings, the declaration of procedural rights required in the bail-setting process "(can) not prejudice the conduct of trial on the merits." Id. The Gerstein Court explicitly and unanimously rejected the notion that such relief is barred by comity principles, and remanded the case to the lower court for a new order prescribing probable cause hearings consistent with its view of the merits. Thus Gerstein clearly establishes that considerations of comity do not bar the relief granted in this case, and

that it is proper and necessary for this Court to reach the merits.*

The cases relied on by appellants, in which federal courts refused to intervene against state criminal proceedings on grounds of comity, all involved requests for relief wholly different in kinds and consequence from the relief granted in Gerstein and in the present case. In Younger v. Harris, supra, the plaintiff sought an injunction against the enforcement of an allegedly unconstitutional statute. The Court held that such relief was barred by "the basic doctrine of equity jurisprudence that courts of equity should not act to restrain a criminal prosecution" except in extraordinary circumstances. 401 U.S. at 43-44. That holding was extended to declaratory relief against the underlying statute in Samuels v. Mackell, 401 U.S. 66 (1971), and to an order requiring suppression of obscene materials unlawfully seized by state authorities in Perez v. Ledesma. 401 U.S. 82 (1971), since in both cases the federal relief would have aborted the state proceedings.

These cases, and subsequent elaborations of the

---

* Interestingly, appellants do not allude to the comity holding of Gerstein in their brief, although they cite it several times in other connections.

comity doctrine, stand for the proposition that the federal courts will not intervene in a pending state criminal proceeding either to enjoin it or to decide questions that are properly litigable in defense of the criminal proceedings itself. The evils to be avoided are conflicting adjudications within the same case, erosion of the role of the jury, piecemeal litigation of one case in two courts, premature federal rulings on the constitutionality of state statutes and the disruption or abortion of the state proceedings. Younger v. Harris, supra, 401 U.S. at 44; Stefanelli v. Minard, 342 U.S. 117, 123-24 (1951). Appellees here do not seek to enjoin any prosecutions, nor do they raise issues as to facts, constitutionality of statutes, admissibility of evidence, or anything else properly raised in defense to state criminal charges. For this reason, none of the dangers cited above are presented in this case, and the policies of the Younger doctrine are not implicated.*

---

* The lower court cases relied on by appellants are also inapposite. In Leslie v. Matzkin, 450 F.2d 310 (2d Cir. 1971), this Court declined to order the state to furnish free transcripts of probable cause hearings to all indigent accused persons before trial, on grounds that there was no right to such transcripts without a showing of prejudice in a particular case, and that state procedures (including appeal) were adequate to protect the plaintiffs' rights. In Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), this Court refused to require appointment of counsel before interrogation of prisoners because no irreparable injury had been shown; the prisoners were regularly advised of their rights, and the exclusionary rule provided a remedy for any possible violations. Although sensitivity to states' interests was cited in rejecting such an unnecessary and overly broad remedy, this Court concluded that preliminary relief should have been granted as to the second claim of brutality and harassment.

(footnote continued)

(footnote continued from preceding page)

Such a general concern with the state's administration of its criminal laws similarly led this Court to hold that a federal court should not "second-guess" a state judge's order means to assure the orderly trial of a highly publicized case. McLucas v. Palmer, 309 F.Supp. 1353 (D.Conn.), aff'd, 427 F.2d 239 (2d Cir.), cert. denied, 399 U.S. 937 (1970). Once again, the plaintiffs' rights were held to be adequately protected by the state court's criminal procedures and the availability of appeal. Similarly, in Harrington v. Arcenaux, 367 F.Supp. 1268 (W.D.La. 1973), a Louisiana District Court held that the statutorily mandated bail hearing was an adequate remedy.

The cryptic opinion of the Ninth Circuit in Cadena v. Perasso, 498 F.2d 383 (9th Cir. 1974), also pointed to the adequacy of remedies in a single defense for the allegedly unconstitutional manner in which one judge conducted probation revocation hearings; the court further concluded that a continuous federal audit of the judge's behavior by the federal court would be as improper as the relief contemplated in O'Shea v. Littleton, supra.

To the extent that these cases turn on the adequacy of state procedures for vindicating the rights asserted, they are especially inapposite, since the gravamen of the complaint and proof in this case is the inadequacy of state procedures. Moreover, the question of improper bail procedures -- like the lack of a probable cause determination -- is mooted on appeal from a criminal conviction.

The other cases cited by appellants are even more clearly irrelevant. Koehler v. Ogilvie, 53 F.R.D. 98 (N.D.Ill. 1971) (three-judge court), aff'd, 405 U.S. 906 (1972), was a class action challenging the constitutionality of Illinois divorce laws. The three-judge court held that abstention was appropriate because state court interpretations might avoid or modify the constitutional questions raised. In Fowler v. Alexander, 340 F.Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973), although the District Court applied Younger broadly to bar adjudication of a statute imposing costs on a complaining witness, the Court of Appeals affirmed the dismissal solely because of the absence of a case or controversy. Finally, Kail v. Rockefeller, 275 F.Supp. 937 (E.D.N.Y. 1967) and New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148 (S.D.N.Y. 1967) involved attempts to obtain federal "reapportionment" of state judicial districts -- a subject far removed from the constitutional rights of criminal defendants.

Insofar as any of these cases may be interpreted as suggesting that Younger principles bar the relief below, they have been limited or overruled by Gerstein v. Pugh, supra.

These distinctions were dispositive in Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973), relied on by the lower court and cited with approval in Gerstein, supra, 95 S.Ct. at 860 n. 9. In Conover, plaintiffs challenged the constitutionality of the intake procedures of the Philadelphia Family Court. The Third Circuit held that Younger and Samuels did not govern because modification of intake procedures would not necessarily hinder the state adjudicatory process or substitute federal fact-finding for that of the state court. Judge Adams elaborated on this point in his concurrence:

> (P)laintiffs are here attempting to secure only a federal court judgment that holding juveniles without a preliminary hearing or an equivalent proceeding to ascertain probable cause is unconstitutional. Under these circumstances, a federal court's declaration of unconstitutionality or an injunction requiring the officials to institute a preliminary hearing procedure would in no way adversely affect the state's legitimate interest in conducting its delinquency hearings without direct interference. No delinquency hearings would be enjoined. Indeed, the sole effects of giving the plaintiffs the relief they seek would be a requirement that, in the future, preliminary hearings or an equivalent proceeding to determine probable cause be held. 477 F.2d at 1091 (emphasis in original) (footnote omitted).

See also, Morgan v. Wofford, 472 F.2d 822, 826 (5th Cir. 1973); Gilliard v. Carson, 348 F.Supp. 757, 762 (M.D.Fla. 1972). Cf. Bokulich v. Jury Commission of Greene County, Alabama, 293 F. Supp. 181 (N.D.Ala. 1968), aff'd, 394 U.S. 97 (1969) (per curiam);

Penn v. Eubanks, 360 F.Supp. 699 (M.D.Ala. 1973).*

Appellants' reliance on O'Shea v. Littleton, 414 U.S.

---

* It is worth noting that even if Younger were held applicable in some fashion to this type of lawsuit, the present case would fall within Younger's exceptions. One who is threatened by injury that is great, immediate, and irreparable, over and above "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution," may obtain federal relief against a state prosecution despite the comity doctrine. Younger v. Harris, supra at 46. The severity of incarceration, combined with its drastic effect on the ability to prepare a defense and withstand plea-bargaining pressures, and with the excessive trial delays suffered by detainees in Kings County, surely is "great, immediate and irreparable" under Younger. Morgan v. Wofford, supra, 472 F.2d at 826; Gilliard v. Carson, supra, 348 F.Supp. at 762. Appellants' reference to the "inconvenience" of prolonged pre-trial incarceration (Appellants' Brief at 35) is simply incredible. To hold that such injuries, arising from unconstitutional procedures, are "normally incidental" to a criminal defense is to hold that a state judicial system can fucntion unconstitutionally with impunity. Even absent bad faith, the state procedures at issue have the same continuing, adverse effects on appellees as the "official lawlessness" excepted from the Younger doctrine, and the reasons for deference to state process are outweighed by the injuries suffered and "by the perversion of the very process that is supposed to provide vindication. . . ." Younger v. Harris, supra, 401 U.S. at 56 (Stewart, J., concurring).

Moreover, the Younger holding was premised in part on the equitable doctrine that courts of equity should not intervene when the moving party has an adequate remedy at law -- in this context, raising his claims defensively in the criminal proceeding. Younger, supra, 401 U.S. at 43-44. However, relief may be granted if "the threat to the plaintiff's federally protected rights (is) one that cannot be eliminated by his defense against a single criminal prosecution." Id. at 46. Here, appellees have proved that the bail practices of the Kings County courts do not provide an adequate forum for the protection of their Eighth and Fourteenth Amendment rights.

488 (1974), is also misplaced. Plaintiffs in O'Shea mounted a frontal, broad-scale attack on the entire criminal justice system of Cairo, Illinois. The State's Attorney, his investigator and the police commissioner were charged with intentional racial discrimination in the performance of their duties, with the result that the law was deli'erately applied more harshly against blacks than against whites. A county magistrate and a judge were charged with employing unconstitutional bail procedures, imposing harsher sentences and conditions on black defendants, and requiring indigents to pay jury fees. All the officials were charged with intentionally using their power to deter plaintiffs from peacefully protesting racist practices in Cairo. Plaintiffs sought far-reaching injunctive relief directing the defendants to stop their discriminatory practices.

The Court dismissed the case on standing grounds because "(n)one of the named plaintiffs (was) identified as himself having suffered any injury in the manner specified," id. at 495, and because the prospect of future injury was very tenuous.* The Court stated in dicta, however, that the kind of relief sought by plaintiffs would necessarily entail "abrasive and unmanageable intercession," id. at 504, into the day-to-day conduct of local criminal proceedings. Because plaintiffs alleged the existence of pervasive racial and wealth discrimination throughout the entire criminal process, effective relief

---

* Plaintiffs in the present action, on the other hand, have suffered and continue to suffer extensive specific injuries solely because of their inability to purchase their freedom by posting money bail. Thus, they clearly have standing to sue. See Brief of Amicus Curiae Legal Aid Society.

would have required a wholesale federal takeover of Cairo's prosecutorial and judicial systems. By seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials," the plaintiffs appeared to "contemplate interruption of state proceedings to adjudicate assertions of non-compliance" in a kind of "ongoing federal audit of state criminal proceedings . . . " Id. at 500. The amorphous nature of the class and the vague allegations of injury only compounded the problem of fashioning precise and effective relief. Id. at 501-502. Not surprisingly, the Court found that granting the requested relief "would indirectly accomplish the kind of interference that Younger v. Harris, supra, and related cases sought to prevent." Id. at 500.

It is evident from the description of O'Shea presented above that there are radical differences between that case and the present case. The relief granted here is obviously much more limited, manageable, and specific than the relief sought in O'Shea. Judge Judd's order in no way halts or impedes the conduct of state criminal proceedings. It does not require interlocutory adjudication of issues that should be raised in pending state proceedings. It does not contemplate or necessitate federal intrusion into discretionary decisions of state judges. No ongoing federal supervision or monitoring is contemplated,

and no periodic reporting is required. Appellees have been granted certain procedural guarantees in the bail-setting process. Further relief in the District Court would be limited to the conjectural and hopefully unlikely situation where the declared rights to hearings or statements of reasons were refused by the state courts. The legal sufficiency of particular hearings or statements are matters that should properly be raised in the state courts by attorneys representing accused persons, and federal review of these individual matters would be dealt with only on habeas corpus, if at all, after exhaustion of state remedies.

Appellants also err in asserting that the previous decisions of the Second Circuit in this action require reversal of the District Court order currently under review.

In the first Wallace decision, 481 F.2d 621 (2d Cir. 1973) (per curiam), cert. denied, 414 U.S. 1135 (1974), this Court overturned an order (1) restraining the Legal Aid Society from accepting more than forty cases per lawyer in Brooklyn Supreme Court and (2) directing the Clerk of the Supreme Court to calendar pro se motions by criminal defendants who were represented by counsel in the underlying cases. As to the first matter, the Court of Appeals held that the District Court lacked jurisdiction over the Legal Aid Society because the Society was not acting under color of state law. On the second issue, the Court held that the principle of comity forbade intervention into the ministerial aspects of state court

administration. This holding as to comity was not explained, and likely rests on the fact that at issue was only a minor and ministerial calendaring procedure which by itself probably was not of constitutional proportions. Further, a broader reading of the holding would make it inconsistent with the subsequent decision of the Supreme Court in Gerstein v. Pugh, supra.

In the second Wallace decision, Judge Judd had ordered that each detainee awaiting trial in Brooklyn Supreme Court for more than six months be entitled to release on recognizance if not brought to trial within forty-five days of a demand for a trial. The order also provided that delays caused by the inmate would not toll the initial six month period, but that such delays would toll the forty-five day period subsequent to the demand for a trial. 371 F.Supp. 1384 (E.D.N.Y. 1974). This Court reversed on the authority of Barker v. Wingo, 407 U.S. 514 (1972), holding that relief from undue trial delay could only be granted after a "fine, albeit difficult, case-by-case determination of whether a prejudicial delay exists as to any individual inmate." 499 F.2d 1345, 1350 (2d Cir. 1974). This holding, of course, has nothing to do with comity. Moreover, in the present appeal, there is no issue of non-discretionary regulations imposed by the lower court. The relief entails no elimination of substantive judicial discretion and no quantified formulae for bail-setting. Rather, it seeks to guarantee appellees the

case-by-case determination of bail to which they are entitled by requiring that the exercise of discretion be better informed and surrounded by adequate procedural safeguards. Thus, the underlying premises of the Supreme Court's decision in Barker and the Second Circuit's most recent decision in this case -- that in the case of every person accused of crime, unique factors exist and must be fully and fairly considered* -- support appellees' due process claims and the relief granted below.

In summary, considerations of federalism and comity do not bar the relief granted by the District Court. The cases discussed above establish general criteria for determining whether a federal court mandate involving the state criminal process is permissible:

1. A federal court may not grant relief directed against a state prosecution "as such" except under extraordinary circumstances. It may not issue an order which will have the effect, either directly or indirectly, of bringing the state criminal proceeding to a halt. However, a federal court

---

* This premise was also respected in Judge Judd's dismissal of the claims regarding coerced guilty pleas. The court had found as a fact that pre-trial detention has a coercive influence on an accused's decision to stand trial or plead guilty, Wallace v. Kern, supra, 371 F.Supp. at 1388, and this conclusion is reiterated in the present opinion below. Op. at 24, 60. However, Judge Judd held that the question of involuntariness of pleas must be determined on a case-by-case basis. Op. at 58-60.

may grant relief which concerns matters ancillary to the criminal proceedings themselves and which cannot be raised in defense of the criminal prosecution. In the present action, the District Court order clearly fits into the latter category, as it is directed only to the legality of bail procedures.

2. Relief may not be granted which necessitates federal review of, or interferes directly with, discretionary decisions of state court judges on substantive issues. Similarly, a federal court may not engage in ongoing monitoring and supervision of such decisions. However, a federal court may grant and enforce simple, workable relief directing or declaring that a state must afford an accused person certain procedural safeguards. In the present action, the District Court's decision establishes simple and workable procedures, and will not involve the federal courts in review of individual bail determinations. Comity is, therefore, no bar to the order below.

Finally, the judgment below should be neither surprising nor controversial under modern views of federal civil rights jurisdiction. The Civil Rights Act of 1871 was designed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise," a state might fail to take such steps as were necessary to vindicate rights guaranteed by the Fourteenth Amendment. Monroe v. Pape,

365 U.S. 167, 180 (1961). The Act was specifically directed at situations "where the state remedy, though adequate in theory, was not available in practice," id. at 174; therefore, the state remedy need not be sought and refused before federal relief is sought. Id. at 183. The legislative history "makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972). Since the Act of 1871, the Supreme Court has emphasized, the federal courts have become "the primary and powerful reliance for vindicating every right given by the Constitution, the laws and treaties of the United States. Frankfurter and Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65," quoted in Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis supplied by Court).

That state courts, as well as other state institutions, are subject to the provisions of the Civil Rights Act is beyond doubt in view of its history:

> It is clear from the legislative debates surrounding passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, whether that action be executive, legislative, or judicial," Ex parte Virginia, 100 U.S. 335, 346 (emphasis supplied).
> Proponents of the legislation noted that state courts were being used to harass and

> injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights.
>
> * * *
>
> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. Mitchum v. Foster, supra, 407 U.S. at 240, 241-42.

Appellees here have alleged and proved, and the District Court has found, that bail procedures in Kings County Supreme Court are constitutionally defective. The record shows that the initial bail determination is made in a hasty and perfunctory manner based on inadequate and often erroneous information, that no reasons for bail determinations are given, and that bail review in the state courts is vitiated by the presumption of validity accorded the initial decision and by the absence of stated reasons to provide a basis for adequate review. This showing of widespread and systematic deprivations of constitutional rights in the very tribunals charged with their protection brings this case within the center of federal civil rights jurisdiction and mandates affirmance of the decision below.

POINT III

THIS ACTION IS PROPERLY BROUGHT UNDER 42 U.S.C. SECTION 1983.

Appellants' argument that habeas corpus is the sole federal remedy for appellees borders on the frivolous. The Supreme Court stated that when a state prisoner challenges "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). Appellants come under neither rubric. They do not challenge the "very fact or duration" of their confinement; they challenge the procedures by which their bail is set. They do not seek "immediate release or a speedier release;" they seek procedural reform which might or might not result in the release of a given member of the class.

Less than a year after Preiser, the Supreme Court made it clear that such claims and remedies, bearing only an indirect and contingent relationship to actual release, are outside the scope of the Preiser holding. In Wolff v. McDonnell, 418 U.S. 539 (1974), state prisoners brought a Section 1983 suit challenging disciplinary procedures involving the deprivation of "good time" -- precisely the issue raised in Preiser. They

sought restoration of good time, damages, and injunctive relief against the allegedly unconstitutional procedures. Though restoration of good time was clearly barred by Preiser, the Court held that the damage claim was not, "and because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." 418 U.S. at 555 (emphasis supplied). Thus, procedural challenges that may ultimately affect the fact or duration of a prisoner's confinement are distinguished from challenges to confinement itself, and are cognizable under Section 1983. See Clutchette v. Procunier, 497 F.2d 809, 813-14 (9th Cir. 1974).

Any doubt as to the applicability of this distinction in the present case should have been dispelled by Gerstein v. Pugh, supra. The relief in Gerstein bore the same relationship to release from custody as does the relief in this case; a finding of no probable cause would result in release, under either the lower court's view of the merits or the Supreme Court's, just as certainly as a finding under Judge Judd's order that an accused person could be released on his own recognizance. Yet the Supreme Court held:

> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination.

> This was also the only relief that the District Court ordered for the named respondents . . . . Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, . . . ; see Wolff v. McDonnell, . . . 95 S.Ct. at 859, n.6 (citations omitted).

Neither this aspect of Gerstein nor the distinction drawn in Wolff v. McDonnell is mentioned in appellants' brief.* However, their argument is definitively refuted by these cases.**

---

* Appellants do, however, allude (Appellants' Brief at 54n.) to the fact that this Court has upheld a challenge to parole decision procedures under Section 1983, even though the decision represents the difference between incarceration and conditional liberty, in United States ex rel. Johnson v. Chairman of New York State Board of Parole, supra, 500 F.2d at 929 -- a case that strongly supports appellees' position.

** Interestingly, appellants, in making their argument, appear to concede the value of the relief below (Appellants' Brief at 54-55):

> It is clear that the relief requested and that ordered by the District Court . . . is intended to and will result in the release of many pre-trial detainees. Indeed, the witnesses testified for example . . . that more defendants could be released if the courts had more information (A. 99-100, 169, 202); that verification of the information provided (effected by the District Court by way of evidentiary hearings) would result in the release of more defendants (A. 208, T.B. 186, T.E. 61-62); and that a statement of reasons would be helpful in seeking bail reductions (T.B. 151, 154).

CONCLUSION

Appellees, a class of pre-trial detainees, have shown in the District Court that their Eighth and Fourteenth Amendment rights are systematically and routinely denied by the bail practices and procedures employed in the state courts. Faced with a similarly egregious set of facts, this Court declared:

> . . . (P)re-trial detainees are people, not outcasts, who are presumed to be innocent of any crime, and who have rights guaranteed by the Constitution, as do we all. When a district court is presented with a claim of violation of those rights, its proper function is to decide the case before it, whatever sympathy it may have for those who must manage a great metropolis beset by grievous problems. Rhem v. Malcolm, supra, 507 F.2d at 342.

WHEREFORE, appellees respectfully request that the judgment appealed from be affirmed.

Respectfully submitted,

DANIEL L. ALTERMAN
ROBERT BOEHM
WILLIAM M. KUNSTLER
Center for Constitutional Rights
853 Broadway
New York, N.Y.

STEPHEN M. LATIMER
579 Cortlandt Avenue
Bronx, New York

ALVIN J. BRONSTEIN
NANCY CRISMAN
National Prison Project
1346 Connecticut Ave. N.W., Suite 1301
Washington, D.C. 20036

JAMES REIF
National Lawyers Guild
23 Cornelia Street
New York, New York

Attorneys for Appellees*

Dated: New York, N.Y.
May 16, 1975

---

* Appellees wish to acknowledge with thanks the substantial assistance in the preparation of this brief rendered by Robert Hermann of the New York University School of Law and Donald Zeigler of the Legal Aid Society.

Appellees also wish to acknowledge with thanks the assistance rendered by Helene Pimsler, Katrina Pflaumer, Merle Ratner, John Boston, and Arthur Read.